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IN THE

Supreme Court of the United States

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MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

KRAUS-ANDERSON CONSTRUCTION COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents an important question regarding the recognition and enforcement of Indian tribal court judgments in the federal courts. The question presented is whether an action to obtain recognition of a tribal court judgment presents a federal question under 28 U.S.C. § 1331, based on the common law and the federal character of Indian law, and whether the Eleventh Circuit was incorrect in its holding, which conflicts with other circuit court and Supreme Court precedents, that the district court lacked subject matter jurisdiction to enforce the Miccosukee Tribal Court judgment in this case.

PARTIES

Petitioner:

The Miccosukee Tribe of Indians of Florida is the petitioner in this case. The Tribe was the plaintiff/appellant below.

Respondent:

Kraus-Anderson Construction Company is the respondent. Kraus-Anderson was the defendant/appellee below.

CORPORATE DISCLOSURE STATEMENT

The Miccosukee Tribe of Indians of Florida has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Miccosukee Tribe of Indians of Florida ("Tribe") respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, which found that a federal district court lacks jurisdiction to domesticate a Miccosukee Tribal Court judgment.

OPINIONS BELOW

The Eleventh Circuit issued an opinion in this case, as well as an order denying en banc consideration. The opinion and final judgment of the court of appeals is styled, *Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Construction Co.*, 607 F.3d 1268 (11th Cir. 2010), and is included at Appendix A. The United States District Court for the Southern District of Florida's order granting summary judgment to Kraus-Anderson Construction Company ("Kraus-Anderson") is included at Appendix B, and the district court's final judgment is included at Appendix C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254. The Eleventh Circuit panel entered an opinion and final judgment on May 28, 2010 (App. A). The court of appeals later denied rehearing en banc by order dated August 30, 2010 (App. D).

STATUTES INVOLVED

This case concerns the reach of 28 U.S.C. § 1331, the federal question jurisdictional statute.

STATEMENT OF THE CASE

I. Factual Background

This Petition concerns the Tribe's attempt to enforce a Miccosukee Tribal Court judgment against a construction contractor in federal court. This case arose from three contracts that the Tribe negotiated in the late 1990s, with Kraus-Anderson, for the construction of several buildings on the Tribe's Reservation in South Florida. Pursuant to the construction agreements, the Tribe agreed to waive sovereign immunity as to any claims arising in connection with the contracts so long as Kraus-Anderson agreed to resolve any such disputes in the Miccosukee Tribal Court. In 1999, certain disagreements arose regarding money due under the contracts, culminating in the Tribe's refusal to pay certain construction invoices on the basis that Kraus-Anderson had overcharged for its work.

II. The Tribal Court's Decision

On May 24, 2001, after the parties were unable to resolve their differences, Kraus-Anderson filed a complaint in Tribal Court to collect approximately $7,000,000 in unpaid invoices from the Tribe. The Tribe responded with a counterclaim alleging the right to a set-off based on Kraus-Anderson's overcharges and construction defects. On June 18, 2004, after discovery and a bench trial, the Tribal Court issued a decision denying Kraus-Anderson's claims and awarding the Tribe $1,600,000 on its counterclaim.

Thereafter, Kraus-Anderson filed a request for an appeal with the Tribal Business Council, arguing that the Tribal Court exceeded it powers, excluded material evidence, and rendered a decision based on prejudice. On July 15, 2004, the Council determined that no appeal would be allowed because "the Tribal Court committed no prejudicial error in reaching its decision" and the company otherwise "raise[d] no issues meriting review" by the Miccosukee Tribal Court of Appeals. *Kraus-Anderson*, 607 F.3d at 1272 (App. A). Specifically, the Council stated:

> In accordance with Tribal procedure, the Miccosukee Business Council conducted a review of the record in this case and convened a special session to consider [the requested] appeal. After careful consideration, the Miccosukee Business Council has determined that the Miccosukee Tribal Court Order, which is the subject of [Kraus-Anderson's] Notice of Appeal, does not constitute a departure from the essential requirements of Miccosukee Law and/or procedure and other applicable laws and raises no issues meriting review by the Miccosukee Court of Appeals. Accordingly, the Miccosukee Business Council has decided to disallow the appeal. The decision of the Miccosukee Business Council is final.

See District Court's Summary Judgment Order at 10-11 (quoting July 15, 2004 Letter Disallowing Appeal) (App. C).

III. The District Court's Decision

Despite the Council's decision, Kraus-Anderson refused to pay the Tribal Court judgment. Therefore, the Tribe commenced this action in federal district court to obtain recognition of the judgment by the United States, and to enforce and domesticate it. The Tribe's complaint alleged three bases for federal court jurisdiction: federal question, 28 U.S.C. § 1331; diversity of citizenship, 28 U.S.C. § 1332; and comity under the federal common law pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738. *See Kraus-Anderson*, 607 F.3d at 1272 (App. A).

In its answer to the complaint, Kraus-Anderson asserted that the Tribal Court judgment was unenforceable because, in its view, the Tribal Business Council violated due process by disallowing its request for an appeal. The answer denied that diversity or comity jurisdiction existed, but admitted that federal question jurisdiction under § 1331 was present because "the matter at issue implicates [Kraus-Anderson's] due process rights under the United States Constitution and the Indian Civil Rights Act." *See* Summary Judgment Order at 4 (quoting Defendant's Second Amended Answer to the Complaint) (App. C). In other words, Kraus-Anderson alleged that jurisdiction was proper because it had raised a federal question as a defense.

In the district court's summary judgment order, it conducted a subject matter jurisdiction analysis and ultimately concluded that jurisdiction was present pursuant to § 1331. First, however, the district court concluded that jurisdiction was not grounded in

diversity or the federal common law of comity under the Full Faith and Credit Act. *Id.* at 3 n.3, 4 n.4. It also noted that Kraus-Anderson's defenses could not confer federal question jurisdiction because "the well-pleaded complaint rule requires that a court look 'to the face of the complaint rather than to defenses, for the existence of a federal question.'" *Id.* at 4 (quoting *Jones v. LMR Int'l, Inc.*, 457 F.3d 1174, 1178 (11th Cir. 2006)). As for the complaint, the district court found that it did not "disclose a proper statutory basis for federal subject matter jurisdiction." *Id.* But, that did not end the court's inquiry as to federal question jurisdiction.

Following the Ninth Circuit's decision in *Wilson v. Marchington*, 127 F.3d 805, 813 (9th Cir. 1997), the district court held that federal question jurisdiction nevertheless existed because an action to enforce a tribal court judgment must be decided by reference to federal common law: "[T]he Court finds that subject matter jurisdiction over this action, which seeks the enforcement of a tribal court judgment against a non-Indian party, is based on federal common law," and that such federal common law claims fall within § 1331's statutory grant of jurisdiction. *See* Final Summary Judgment Order at 5 (citing *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) and *MacArthur v. San Juan County*, 391 F. Supp. 2d 895, 987-88 (D. Utah 2005)).

After finding jurisdiction present, the district court granted summary judgment to Kraus-Anderson, holding that the Tribal Court judgment could not be afforded comity because the Council was an interested party in the litigation and its denial of Kraus-Anderson's

appeal violated due process. *Kraus-Anderson*, 607 F.3d at 1272 (App. A).

IV. The Eleventh Circuit's Decision

The Tribe appealed the summary judgment order to the Eleventh Circuit Court of Appeals. The Eleventh Circuit did not reach the merits of the Tribe's appeal, but instead focused on whether the district court had jurisdiction to entertain the Tribe's complaint in the first instance.

As to diversity jurisdiction, the Eleventh Circuit agreed with the district court, and "every court of appeals that has addressed the issue," that Indian tribes cannot sue or be sued in diversity under § 1332 because they are not citizens of any state. *Id.* at 1276 (quoting the district court's order). The court of appeals also rejected jurisdiction under the Full Faith and Credit Act: "Under circuit precedent, it is long established that § 1738 does not, standing alone, confer jurisdiction on a federal district court to domesticate a judgment rendered by a court of another jurisdiction." *Id.* The court noted that when an action already rests on federal question jurisdiction under § 1331, a party may appeal to comity as a discretionary basis for the court to decide whether a foreign judgment should be given preclusive effect. *Id.* at 1276-77.

Addressing § 1331, the Eleventh Circuit stated that federal question jurisdiction does not exist merely because an Indian tribe is a party to the action or because the case involves a contract with an Indian tribe. *Id.* at 1273. Rather, "a plaintiff's complaint still

must 'claim a right to recover under the Constitution and laws of the United States.'" *Id.* The Court observed the "lack of reference to any discernible federal law" in the Tribe's complaint, but noted that the parties argued, and the district court believed, that § 1331 jurisdiction was predicated on the federal common law: "The Tribe argue[d] that the district court had jurisdiction based on the quintessentially federal character of Native American law and that its claim for enforcement of a tribal judgment on non-tribal land relied exclusively on the Federal Government's longstanding policy of encouraging tribal self-government."[1] *Id.* at 1274 (internal quotation marks omitted).

While recognizing that claims founded upon federal common law may support federal question jurisdiction, the Eleventh Circuit found that was not the case here, citing this Court's decision in *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003), which "made clear" that "vague assertions" of federal common law by an Indian tribe will not support federal question jurisdiction. *Id.* The Eleventh Circuit concluded that, "here, the Tribe has failed to explain the specific prescription of federal common law that enables it to maintain an action to enforce a judgment handed down by a tribal court in a proceeding to which the defendant consented by contract." *Id.*

The court of appeals next considered whether there was "another way" that federal question jurisdiction

1. Before the court of appeals, Kraus-Anderson similarly argued "that 'the existence of abundant federal common law pertaining to Indian Tribes is sufficient to invoke federal question jurisdiction.'" *Id.* at 1274.

might exist. *Id.* While acknowledging that questions regarding "the reach of Indian power" and "[w]hether a tribal court has adjudicative authority over nonmembers" are sufficient to confer federal question jurisdiction under the common law, the Eleventh Circuit believed that this case did not concern those issues. *Id.* at 1274-75. In this case, the court said, "the tribe has not asked for a declaratory decree to resolve a dispute over whether the Tribal Court had jurisdiction to entertain [Kraus-Anderson's] claim for payment and the Tribe's set off and counterclaim." *Id.* at 1275. Thus, the Eleventh Circuit held that "[a] suit to domesticate a tribal judgment does not state a claim under federal law, whether statutory or common law," and thus the district court lacked federal question jurisdiction to adjudicate the complaint. *Id.* Accordingly, the court of appeals reversed and remanded with instructions that the complaint be dismissed for lack of subject matter jurisdiction. *Id.* at 1277.

Kraus-Anderson submitted a petition for rehearing and rehearing en banc, which the court denied on August 30, 2010. The Tribe now seeks a writ of certiorari to review the Eleventh Circuit's decision, which conflicts with Ninth Circuit and Supreme Court precedents on the important issue of whether federal question jurisdiction exists to enforce a judgment rendered by an Indian tribal court. *See id.* at 1275.

REASONS FOR GRANTING THE PETITION

In this case, certiorari should be granted because there is a conflict with circuit court and Supreme Court precedents regarding whether an Indian tribe may avail itself of a federal forum to enforce and domesticate a judgment entered by an Indian tribal court. This Court has long recognized that inquiries as to subject matter jurisdiction are threshold and must be addressed at the outset, as the answer governs whether a lawsuit, and lawsuits of its kind, may be entertained at all by the federal courts. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (subject matter jurisdiction is a "threshold matter" that is "inflexible and without exception") (collecting cases). Recognizing therefore the importance of jurisdictional questions, this Court has in the past granted review to resolve the threshold issue of jurisdiction. *See, e.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 582-83 (1999) (certiorari granted to resolve conflict between circuits on jurisdictional issue). And it has done so where the question of jurisdiction involves the enforcement of an Indian tribal court's judgment. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 847 (1985) (certiorari granted to determine if district court had jurisdiction to enjoin tribal court proceedings and judgment).

In this case, the Court should address the question of whether *National Farmers* makes federal forums available to non-Indians while denying that same forum to Indian tribes seeking to enforce judgments entered in their own courts. This Court should conclude that, for the reasons stated in *National Farmers*, Indians are entitled to a federal forum equally with non-Indians.

I. This Court Should Grant Certiorari Because The Circuits Disagree On An Important Question Of Federal Jurisdiction

Certiorari is warranted in this case because the Eleventh Circuit's decision conflicts with Ninth Circuit precedent regarding whether an Indian tribe may avail itself of a federal forum to enforce and domesticate a tribal court judgment. Without intervention by this Court, a tribe's right to a federal forum will vary depending solely on geography. Moreover, enforceability of tribal court judgments is a significant issue of national importance because it affects the ability of tribal courts to render enforceable decisions, and therefore the sovereignty of Indian tribes.

A. In The Ninth Circuit, Tribal Court Judgments May Be Enforced In Federal Court

In *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), the Ninth Circuit entertained an appeal in a federal lawsuit to enforce a tribal court judgment. The question presented was "whether, and under what circumstances, a tribal court tort judgment is entitled to recognition in the United States Courts." *Id.* at 807. The court of appeals answered this question by holding that "the recognition and enforcement of tribal judgments in federal court must inevitably rest on principles of comity," and "as a general principle, federal courts should recognize and enforce tribal judgments." *Id.* at 810. It also held that the federal common law applied to the enforcement of tribal judgments because "Indian law is uniquely federal in nature, having been drawn from the Constitution, treaties, legislation, and

an 'intricate web of judicially made Indian law.'" *Id.* at 813 (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978)). Further, the Ninth Circuit said that "the quintessentially federal character of Native American law, coupled with the imperative of consistency in federal recognition of tribal court judgments, by necessity require that the ultimate decision governing the recognition and enforcement of a tribal judgment by the United States be founded on federal law." *Id.* Thus, under *Wilson*, a suit to domesticate a tribal judgment presents a federal question.

B. In The Eleventh Circuit, Indian Tribes May Not Seek Enforcement Of Tribal Judgments In Federal Court

In contrast to the Ninth Circuit's holding in *Wilson*, the Eleventh Circuit in this case concluded that the district court lacked subject matter jurisdiction under 28 U.S.C. § 1331 because "[a] suit to domesticate a tribal judgment does not state a claim under federal law, whether statutory or common law." 607 F.3d at 1275. In so holding, the Eleventh Circuit necessarily rejected the Ninth Circuit's decision in *Wilson* that actions to enforce or domesticate a tribal judgment must be decided by reference to federal common law and, thus, are enforceable in federal court.

The Eleventh Circuit referred to *Wilson* only once in a footnote – even though that case formed the basis of the district court's finding of federal question jurisdiction. *See Kraus-Anderson*, 607 F.3d at 1274 n.12 (App. A). But the conflict is clear. According to the Eleventh Circuit's view, "the allegations in the complaint

and nature of Indian law are insufficient to confer federal question jurisdiction" and, therefore, the district court was mistaken in relying on *Wilson*, which the Eleventh Circuit labeled a mere "persuasive" Ninth Circuit case. *Id.*

Thus, the Court should grant certiorari to review this issue over which the circuits are split.[2] As a result of the circuit split, tribes in different parts of the country have different rights when it comes to enforcing their judgments and obtaining federal recognition of those judgments by the United States. The circuit split on this important question of federal jurisdiction should be resolved by this Court with a holding that Indian tribes, no matter where located, may resort to federal court to obtain the federal government's recognition and enforcement of tribal court judgments.

II. This Court Should Grant Certiorari Because The Eleventh Circuit's Decision Conflicts With Supreme Court Precedent

Certiorari is also warranted because the Eleventh Circuit has decided an important federal question in a way that conflicts with this Court's decisions.

The Eleventh Circuit has interpreted prior decisions of this Court – particularly, *National Farmers Union*

2. The Tenth Circuit's *MacArthur v. San Juan County*, 497 F.3d 1057, 1066 (10th Cir. 2007), which held that "[t]he question of the regulatory and adjudicatory authority of the tribes – a question bound up in the decision to enforce a tribal court order – is a matter of federal law giving rise to subject matter jurisdiction under 28 U.S.C. § 1331," supports the Ninth Circuit's conclusion.

Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) – to foreclose federal question jurisdiction except where there is a dispute over tribal court jurisdiction. *Kraus-Anderson*, 607 F.3d at 1275 (App. A). Because the parties in this case agreed that the Miccosukee Tribal Court had jurisdiction, the Eleventh Circuit held that no federal question was present:

> [A] dispute over tribal court jurisdiction is considered a dispute over tribal sovereignty, and therefore – like a dispute over tribal sovereignty – is a matter of federal law to which § 1331 applies. This case, however, does not involve a dispute over whether the Tribal Court had jurisdiction to entertain Kraus-Anderson's claim for payment and the Tribe's set off and counterclaim.

Id. Thus, the court of appeals held that "[a] suit to domesticate a tribal judgment does not state a claim under federal law." *Id.* But the Eleventh Circuit reached this conclusion through an overly literal reading of *National Farmers* that ignores the fundamental holding of the case.

In *National Farmers*, a school district and its insurer commenced a suit in federal district court seeking an injunction against a default judgment entered in tribal court. 471 U.S. at 847. The complaint invoked § 1331 as a basis for jurisdiction, and alleged that the injunction should issue because the tribal court lacked subject matter jurisdiction to enter the default judgment. *Id.* at 847-48. The district court agreed and granted the injunction, but the court of appeals

reversed, finding that the district court did not have subject matter jurisdiction over the complaint. *Id.* at 847. After granting certiorari, this Court reversed the court of appeals and stated:

> The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331. . . . [A] federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.

Id. at 852-53. Based on this statement, the Eleventh Circuit concluded that federal question jurisdiction was not present here because "the Tribe has not asked for a declaratory decree to resolve a dispute over whether the Tribal Court had jurisdiction to entertain Kraus-Anderson's claim for payment and the Tribe's set off and counterclaim." *Kraus-Anderson* at 1275 (App. A). This result is incorrect and wholly ignores the basis for the Court's finding of jurisdiction in *National Farmers*. Further, it means that Indian tribes are denied a federal forum, a result not required or envisioned by *National Farmers*.

As stated in *National Farmers*, "federal law defines the outer boundaries of an Indian tribe's power over non-Indians." *Nat'l Farmers*, 471 U.S. at 851. In *National Farmers*, this Court held that federal question jurisdiction was present because the school district's challenge to the tribal court's jurisdiction was grounded

on the contention that "federal law ha[d] divested the Tribe of th[at] aspect of sovereignty." *Id.* at 852-53.

"Indian tribes did not relinquish their status as sovereigns with the creation and expansion of the republic on the North American continent. The courts of the United States have long recognized that the tribes once were, and remain still, independent political societies." *See, e.g.*, *Vann v. Kempthorne*, 534 F.3d 741, 746 (D.C. Cir. 2008). "At one time [Indian tribes] exercised virtually unlimited power over their own members as well as those who were permitted to join their communities." *Nat'l Farmers*, 471 U.S. at 851. However, one area where federal control of tribal power has been limited "involve[es] the relations between an Indian tribe and nonmembers of the tribe." *See United States v. Wheeler*, 435 U.S. 313, 326 (1978), *superseded by statute on other grounds as stated in Lara*, 541 U.S. at 205-07 (emphasis supplied). Thus, "questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians" have frequently been decided pursuant to federal law by the federal courts. *Nat'l Farmers*, 471 U.S. at 851.

A suit to enforce a tribal judgment belongs in federal court because "federal law defines the outer boundaries of an Indian tribe's power over non-Indians." *Id.* at 851. In reaching a contrary conclusion, the Eleventh Circuit's opinion is inconsistent with the holding of *National Farmers* – a fact that demonstrates the need for certiorari review in this case.

The Eleventh Circuit's view, if sustained, would result in an absence of mutuality in federal jurisdiction. While a non-Indian against whom a judgment is entered in tribal court may avail himself of a federal forum to raise a challenge to the tribal court's jurisdiction, the Indian tribe that obtained the judgment may not go into the same federal court to attempt to domesticate and enforce its judgment. As one commentator has observed:

> *National Farmers Union* involved a lawsuit by a non-Indian insurance company to prevent the imposition of tribal power by a tribal court plaintiff and tribal representatives in violation of federal law. . . . There is no principled reason to limit recognition of such an action to the party alignment in *National Farmers Union*. Under mutuality principles, tribes and non-Indians should stand on the same jurisdictional footing. Either instance presents a compelling federal problem . . . .

See Kaighn Smith, Jr., *Federal Courts, State Power, and Indian Tribes: Confronting the Well-Pleaded Complaint Rule*, 35 N.M. L. Rev. 1, 25 (2005) (footnote omitted).[3] This jurisdictional incongruity occasioned by the court of appeals further suggests the need for Supreme Court review.

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3. The commentator notes that "[t]he Supreme Court and lower federal courts have relied on the principle of mutuality to establish jurisdictional parity for tribal and state interests," citing, for example, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) and *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 257 (8th Cir. 1995). *See* Smith, 35 N.M. L. Rev. at 25 n.193.

III. This Court Should Grant Certiorari Because the Eleventh Circuit's Decision Risks Inconsistent Application And Development Of The Federal Common Law Applicable To Enforcement And Recognition Of Indian Tribal Court Judgments

Certiorari is also warranted because the circuit split risks inconsistent application and development of the federal common law on an issue of particular federal concern, to the detriment of the unique relationship between the federal government and Indian tribes.

In *Wilson*, the Ninth Circuit recognized that "Indian law is uniquely federal in nature, having been drawn from the Constitution, treaties, legislation, and an 'intricate web of judicially made Indian law.'" *Wilson*, 127 F.3d at 813 (quoting *Oliphant*, 435 U.S. at 206). In addition, while recognizing that state law is not always insignificant, the court stated that "the quintessentially federal character of Native American law, coupled with the imperative of consistency in federal recognition of tribal court judgments, by necessity require that the ultimate decision governing the recognition and enforcement of a tribal judgment by the United States be founded on federal law." *Id.*

Further, "this Court ha[s] recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) ("*Grable*"). Specifically, "[t]he doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn

on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Id.*

Obtaining enforcement of a tribal judgment against a non-Indian party is a matter particularly suited for decision by the federal courts. Thus, even assuming that enforcement of tribal judgments does not fall within the traditional reach of § 1331, federal question jurisdiction should be recognized under the authority of *Grable* because the decision to afford comity or full faith and credit to a tribal judgment implicates the unique relationship between the United States and Indian tribes, as well as the uniquely federal nature of Indian law. *See, e.g.*, *MacArthur v. San Juan County*, 391 F. Supp. 2d 895, 987-88 (D. Utah 2005) ("Though a plaintiff seeking enforcement of a tribal court judgment does not plead a cause of action created by federal law, the action nonetheless is one 'arising under' federal law because it "turn[s] on substantial questions of federal law."), *aff'd on this ground*, 497 F.3d 1057, 1066 n.4 (10th Cir. 2007) ("[W]e agree with the district court's observation that 'the action . . . is one arising under federal law because it turns on substantial questions of federal law.'").[4]

The need for consistency in the recognition of tribal judgments necessarily requires that a single body of

4. *See also Wilson*, 127 F.3d at 813; *cf.* 19 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 4517 (2010) ("[T]he Supreme Court recognized Native American relations as another 'enclave' of tradition and necessity in which federal common law may operate.").

federal common law have consistent development and application.[5] This can be achieved only if Indian tribes are afforded a federal forum to obtain recognition and enforcement of their judgments by the United States. Because of the unique status that Indian tribes occupy as "domestic dependent nations," *see Cherokee Nation*

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5. There is a conflict among the circuits as to whether, with respect to recognition and enforcement of tribal court judgments, Indian tribes fall within 28 U.S.C. § 1738, the Full Faith and Credit Act. *See, e.g.*, Heidi McNeil Staudenmaier & Anne W. Bishop, *The Three Billion Dollar Question*, 57 Drake L. Rev. 323, 343 (2005). As noted by courts and commentators alike, "the Supreme Court has broadcast mixed signals as to whether the tribes are to be considered territories or possessions of the United States and thus included within the language of § 1738." *MacArthur*, 497 F.3d at 1066. In *Wilson*, the Ninth Circuit recognized the inconclusiveness of this Court's pronouncements and the division of authority among other courts. *Wilson*, 127 F.3d at 808 (comparing cases).

In *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103 (1855), this Court decided that there is "no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union," and the Court expressly called the Cherokee tribal lands "not a foreign, but a domestic territory, – a territory which originated under our constitution and laws." Of this decision, one prominent Indian law scholar has said, "the earliest decision of the United States Supreme Court on such questions assumes a federal legal obligation to recognize and enforce the laws and judgments of Indian tribes under full faith and credit as judgments of the 'territories,' in a geographic, rather than political, sense." Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal Federal Cooperation*, 36 Ariz. St. L. J. 1, 13 (2004). This approach granted considerable respect to Indian tribal courts. *See id.*

v. Georgia, 30 U.S. 1, 17 (1831), tribal judgments should be subject to recognition by the federal polity, not on a piecemeal state-by-state basis. The Ninth Circuit in *Wilson* recognized this imperative. The Eleventh Circuit in this case did not. Thus, certiorari is warranted to resolve this conflict and to decide that tribal judgments may be enforced in federal district court under the federal common law.

CONCLUSION

For all of the important reasons explained above, the Court should grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit and review its decision in this case.

Respectfully submitted,

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November 2010

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DISMISSING THE APPEAL, FILED MAY 28, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-13039

D. C. Docket No. 04-22774-CV-UU

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 28, 2010
JOHN LEY
CLERK

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Plaintiff-Counter Defendant-Appellant,

versus

KRAUS-ANDERSON CONSTRUCTION COMPANY,

Defendant-Counter Claimant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(May 28, 2010)

Appendix A

Before TJOFLAT and CARNES, Circuit Judges, and BOWEN, *District Judge.

TJOFLAT, Circuit Judge:

In 2004, Kraus-Anderson Construction Company ("Kraus-Anderson") sued the Miccosukee Tribe of Indians of Florida (the "Tribe") for breach of contract in the Miccosukee Tribal Court. The Tribe denied liability and counterclaimed, alleging that Kraus-Anderson was the breaching party. Following a trial on the merits, the Tribal Court denied Kraus-Anderson's claims and, finding for the Tribe on its counterclaim, awarded the Tribe a judgment of $1.65 million. Kraus-Anderson petitioned the Tribe's Business Council for leave to appeal the judgment to the Tribe's General Council, which acts as the Tribal Court of Appeals.[1] The Council denied Kraus-Anderson's petition.

Kraus-Anderson refused to satisfy the Tribal Court's judgment, so the Tribe brought suit against Kraus-Anderson in the United States District Court for the Southern District of Florida to enforce it. As an affirmative defense, Kraus-Anderson alleged that, in denying its petition for leave to appeal the Tribal Court's judgment, the Business Council denied it due process

* Honorable Dudley H. Bowen, Jr., United States District Judge for the Southern District of Georgia, sitting by designation.

1. We refer to the Tribe's General Council as the Tribal Court of Appeals. Under the Miccosukee Criminal and Civil Code, the Business Council has discretion to determine whether to allow the Tribal Court of Appeals to hear an appeal of a Tribal Court judgment.

of law, thereby rendering the judgment void. On cross-motions for summary judgment, the district court, relying on principles of comity, held the judgment unenforceable and granted Kraus-Anderson summary judgment. The Tribe now appeals. We reverse and remand the case to the district court with the instruction that it dismiss the case for lack of subject matter jurisdiction.

I.

A.

The Tribe, a federally recognized Indian tribe, has approximately 550 members and maintains its reservation in Miami-Dade County, Florida. Kraus-Anderson is a large Minnesota-based construction company that specializes in building casino properties for Indian tribes.[2]

Kraus-Anderson and the Tribe negotiated and signed three contracts from 1997 to 1998 for the construction of several buildings on the Tribe's reservation, including a resort hotel and halfway house.[3]

2. From 1993 to 2003, Kraus-Anderson completed more than $400 million in construction projects for Indian tribes.

3. The contracts were signed on the following dates: August 26, 1997, for the construction of a resort hotel and convention center; September 13, 1997, for the construction of a halfway house, clinic, and judicial building; and September 18, 1998, for the construction of a school.

Appendix A

The parties agreed to base the three contracts on the American Institute of Architects Standard Form of Agreement Between Owner and Design/Builder (the "AIA Form").[4] Some of the AIA Form provisions were amended by interlineation; one provision, "*Article 10* Arbitration," was eliminated altogether.[5] Although Kraus-Anderson preferred that claims be resolved pursuant to the arbitration procedures of that article, the Tribe asserted that it would waive its sovereign immunity only if Kraus-Anderson agreed to use the Tribal Court as the forum for resolving contract disputes. Kraus-Anderson relented and, in lieu of Article 10, the parties inserted the following section in *Article 14*:

> 14.4.1.2 Waiver of Sovereign Immunity. The [Tribe] hereby waives any defense of sovereign immunity from suit in Miccosukee Tribal Court in connection with any action or

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4. The parties used the 1985 edition of the AIA Form, specifically the "Part 2 Agreement—Final Design and Construction."

5. *Article 10* contained five sections. Section 10.1 stated that:

> Claims, disputes and other matters in question between the parties to this Part 2 arising out of or relating to Part 2 shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect unless the parties agree otherwise.

> proceeding, including any claim, cross-claim or counterclaim, brought by or against it in connection with this [contract] or any of the transactions contemplated in this [contract] . . . for and only with respect to actions brought in Miccosukee Tribal Court. [The Tribe] does not waive immunity in any form for actions in any court (including Miccosukee Tribal Court) not in connection with this [contract] or any of the transactions contemplated in this [contract].

The AIA Form's choice of law provision, "*Article 11* Miscellaneous Provisions," states, in section 11.1, that "[t]his Part 2 shall be governed by the law of the place where the Work is located." The parties amended section 11.1 so that it provided that Part 2 would be governed by "substantive contract laws of the State of Florida and other substantive laws of the Miccosukee Tribe."

In mid-1999, the parties began to disagree as to the amounts due under the contracts. The Tribe refused to honor certain invoices submitted by Kraus-Anderson, contending that the company had overcharged for the work it had performed and had failed to remedy several construction defects. Settlement negotiations ensued, but the parties were unable to resolve their differences, and the invoices remained unpaid.

B.

On May 24, 2001, Kraus-Anderson filed a complaint against the Tribe in the Tribal Court alleging that $7,077,604.70 was due under the contracts. The Tribe responded with a counterclaim and set-off, neither of which specified a monetary amount, based on Kraus-Anderson's allegedly improper overcharges and construction defects. On June 18, 2004, following discovery and a sixteen-day bench trial, the Tribal Court issued its "Trial Decision," a 166-page document that summarized the evidence and set forth the court's findings and conclusions. In it, the Tribal Court denied Kraus-Anderson's claims and awarded the Tribe judgment in the sum of $1,654,998.88 on its counterclaim.

Kraus-Anderson filed a notice of appeal to the Miccosukee Business Council on July 1, 2004, asserting the following claims of error: the Tribal Court (1) exceeded its powers; (2) rendered a decision based on mathematical errors; (3) excluded material evidence and prejudiced Kraus-Anderson's ability to present its case; and (4) was generally prejudiced against Kraus-Anderson. The Business Council considered these asserted errors and reached a "consensus" that the Tribal Court committed no procedural error in reaching its decision. On July 15, 2004, the Business Council notified Kraus-Anderson that it had "disallowed" its appeal because the company "raise[d] no issues meriting review" by the Tribal Court of Appeals.

C.

Kraus-Anderson did not pay any portion of the judgment entered against it. On November 2, 2004, the Tribe commenced this action to enforce the Tribal Court's judgment. The Tribe's complaint alleged that the district court had federal question jurisdiction under 28 U.S.C. § 1331, diversity jurisdiction under 28 U.S.C. § 1332, and "federal common law of comity jurisdiction" under 28 U.S.C. § 1738. After reciting the contractual events that led to the Tribal Court judgment, the complaint requested the court to "find that the Trial Decision (final judgment) is entitled to recognition, registration, and enforcement in accordance with the applicable federal law and [to] enter [an] order recognizing, registering and enforcing the Tribal Court's Trial Decision (final judgment)."

In its answer, Kraus-Anderson asserted, as an affirmative defense, that the Tribal Court judgment was unenforceable because the Business Council's refusal to allow the appeal denied Kraus-Anderson due process of law. Addressing the complaint's assertion of subject matter jurisdiction, Kraus-Anderson disagreed that the district court had jurisdiction under §§ 1332 and 1738 but admitted that the court had jurisdiction under § 1331 because its answer contained a defense based on the Due Process Clause.

The parties having joined issue, Kraus-Anderson moved the court for summary judgment based on its affirmative defense. The court granted its motion in an

order entered on May 23, 2007. After stating that the complaint failed to disclose a basis for jurisdiction under §§ 1332 or 1738, the court concluded that "subject matter jurisdiction over this action, which seeks the enforcement of a tribal court judgment against a non-Indian party, is based on federal common law," and therefore presented a federal question embraced by § 1331. The court then turned to the question of whether full faith and credit or comity was the appropriate framework for analyzing the enforceability of the Tribal Court's judgment. The court opted for the latter approach and held that the judgment should not be afforded comity because the Business Council was an interested party in the litigation and its disallowance of Kraus-Anderson's appeal constituted a denial of due process. After the court entered a final judgment for Kraus-Anderson in accordance with its May 23 order, the Tribe took this appeal.

II.

We begin, as in all appeals, by asking whether the district court had subject matter jurisdiction. *See Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453, 20 S. Ct. 690, 692, 44 L. Ed. 842 (1900) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes.").[6] In the complaint, the

6. We have jurisdiction under 28 U.S.C. § 1291, which provides that "courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

Tribe asserted three bases for jurisdiction: 28 U.S.C. §§ 1331, 1332, and 1738. The district court concluded that jurisdiction lay under § 1331. We therefore consider that jurisdictional basis first, then address §§ 1332 and 1738.

A.

Although the parties agree with the district court that jurisdiction lies under § 1331,[7] we nonetheless have the obligation to inquire *sua sponte* into whether the district court was correct. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 1331, 89 L. Ed. 2d 501 (1986) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.") (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S. Ct. 162, 165, 79 L. Ed. 338 (1934)); *Fitzgerald v. Seaboard Sys. R.R., Inc.*, 760 F.2d 1249, 1251 (11th Cir. 1985).

Pursuant to § 1331, district courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.[8] "[F]ederal question jurisdiction does not

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7. A finding of jurisdiction under § 1331 is a conclusion of law.

8. Under the "well-pleaded complaint rule,"

> "[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is

(Cont'd)

exist merely because an Indian tribe is a party or the case involves a contract with an Indian tribe,"[9] *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989); a plaintiff's complaint still must "claim a right to recover under the Constitution and laws of the United States," *Bell v. Hood*, 327 U.S. 678, 681, 66 S. Ct. 773, 775, 90 L. Ed. 939 (1946). Although this is not a stringent standard, a mere incantation that the cause of action involves a federal question is not always sufficient. *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 573 (5th Cir. 1980);[10] *see generally* 5 Charles Alan Wright & Arthur R. Miller,

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(Cont'd)

> based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States."

Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6, 123 S. Ct. 2058, 2062, 156 L. Ed. 2d 1 (2003) (quoting *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S. Ct. 42, 43, 53 L. Ed. 126 (1908)) (alteration in original). Thus, in determining the presence of federal question jurisdiction, we may not, as Kraus-Anderson implied in framing its answer to the Tribe's complaint, consider its affirmative defense based on the Due Process Clause.

9. As noted in part I.A., *supra*, the contract here specified it would be governed by Florida and Tribal law.

10. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Federal Practice and Procedure § 1209 (3d ed. 2004). Bearing in mind this standard, we examine whether the Tribe has sufficiently identified a Constitutional provision or federal law under which it can recover.

1.

Despite the complaint's lack of reference to any discernible federal law, the district court invoked its § 1331 jurisdiction on the theory that a case that "seeks the enforcement of a tribal court judgment against a non-Indian party[ ] is based on federal common law." On appeal, in supplemental briefing that we requested following oral argument, the Tribe and Kraus-Anderson similarly rely upon federal common law to support federal question jurisdiction. The Tribe argues that the district court had jurisdiction based on the "quintessentially federal character of Native American law" and that its "claim for enforcement of a tribal judgment on non-tribal land relied exclusively on 'the Federal Government's longstanding policy of encouraging tribal self-government.'" Kraus-Anderson agrees that "the existence of abundant federal common law pertaining to Indian Tribes is sufficient to invoke federal question jurisdiction." We therefore begin by examining the possibility that federal common law created jurisdiction pursuant to § 1331. We conclude that it did not.

"'[C]laims founded upon federal common law as well as those of a statutory origin'" may give rise to federal question jurisdiction. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850, 105 S. Ct.

2447, 2450–52, 85 L. Ed. 2d 818 (1985) (*quoting Illinois v. City of Milwaukee*, 406 U.S. 91, 100, 92 S. Ct. 1385, 1391, 31 L. Ed. 2d 712 (1972)). The Supreme Court has made clear, however, that vague assertions by Indian-tribe plaintiffs regarding federal common law to support federal question jurisdiction will not suffice. In *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 123 S. Ct. 1887, 155 L. Ed. 2d 933 (2003), the Court explained that merely relying on the "federal common law of Indian affairs" does not clarify "what federal law, if any, the Tribe's case 'aris[es] under.'" *Id.* at 712, 123 S. Ct. at 1894 (quoting 28 U.S.C. § 1331)(alteration in original).[11] *See also Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 672 (8th Cir. 1986) ("[T]he fact that the Housing Authority is created by and operates on behalf of an Indian tribe is not alone sufficient to find the existence of a federal question."). Likewise, here, the Tribe has failed to explain the specific prescription of federal common law that enables it to maintain an action to enforce a judgment handed down by a tribal court in a proceeding to which the defendant consented by contract.[12]

11. In *Inyo County*, the Court remanded the case for "focused consideration" as to "what prescription of federal common law enables a tribe to maintain an action for declaratory and injunctive relief establishing its sovereign right to be free from state criminal processes." 538 U.S. at 712, 123 S. Ct. at 1894. Here, remand would be futile, because we explore all of the possibilities based on the complaint's allegations.

12. The district court concluded that it had jurisdiction under § 1331 based on *National Farmers* and a "persuasive" Ninth Circuit case, *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997). *Wilson* discussed the "quintessentially federal

(Cont'd)

2.

Although the Tribe has failed to identify any federal law or constitutional provision that its suit arises under, we proceed to consider another way that federal question jurisdiction may be conferred. Whether a tribal court has adjudicative authority over nonmembers presents a federal question based on federal common law. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, __ U.S. __, 128 S. Ct. 2709, 2716–17, 171 L. Ed. 2d 457 (2008); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15, 107 S. Ct. 971, 976, 94 L. Ed. 2d 10 (1987); *Nat'l Farmers*, 471 U.S. at 852–53, 105 S. Ct. at 2452. In this section, we explain why this case is not a challenge regarding the reach of Indian power and that subject matter jurisdiction does not exist on that basis.

In *National Farmers*, the Supreme Court commented that it "has frequently been required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians." 471 U.S. at 851, 105 S. Ct. at 2451. There, a tribal court entered a default judgment against a state school district, and the school district sought and received an injunction from a federal district court preventing further proceedings in the tribal court. *Id.*

(Cont'd)

character of Native American law." *Id.* at 813. Under our view of *National Farmers*, other Supreme Court precedent, and circuit precedent, the allegations in the complaint and the nature of Indian law are insufficient to confer federal jurisdiction for the reasons articulated in this opinion.

at 847, 105 S. Ct. at 2449. The Supreme Court held that in order to invoke federal question jurisdiction, the school district had to contend that the tribe had been divested of its sovereign authority to enter a judgment—in essence, that a dispute existed over the extent of tribal powers. *Id.* at 852, 105 S. Ct. at 2452. Because the school district contended that federal law "divested the tribe of this aspect of sovereignty," it satisfied this federal question requirement. *Id.* at 852–853, 105 S. Ct. at 2452. In particular, "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court" had to "be answered by reference to federal law and is a 'federal question' under § 1331."[13] *Id.* at 852, 105 S. Ct. at 2452. "[A] federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction." *Id.* at 853, 105 S. Ct. at 2452.

In sum, *National Farmers* dictates that a dispute over tribal court jurisdiction is considered a dispute over tribal sovereignty, and therefore—like a dispute over tribal sovereignty—is a matter of federal law to which § 1331 applies. This case, however, does not involve a dispute over the Tribal Court's jurisdiction. That is, the Tribe has not asked for a declaratory decree to resolve a dispute over whether the Tribal Court had jurisdiction to entertain Kraus-Anderson's claim for payment and

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13. Tribal sovereign immunity was not at issue because the school district was undisputedly non-Indian and a subdivision of the state of Montana. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 560 F. Supp. 213, 215 (D. Mont. 1983).

the Tribe's set off and counterclaim. Both sides agree that the Tribal Court possessed such jurisdiction.[14] What the Tribe asks is that the federal district court domesticate its judgment against Kraus-Anderson so that it can obtain execution of the judgment pursuant to Federal Rule of Civil Procedure 69. A suit to domesticate a tribal judgment does not state a claim under federal law, whether statutory or common law. Thus, the district court lacked § 1331 jurisdiction under *National Farmers* to entertain the Tribe's complaint.

3.

Finally, we note that although Rule 8(a) of the Federal Rules of Civil Procedure requires a complaint to include a "short and plain statement of the grounds for the court's jurisdiction," courts have saved some complaints even though they lacked a jurisdictional statement because they made references to federal law sufficient to permit the court to find § 1331 jurisdiction. *Cf. Gardner v. First Am. Title Ins. Co.*, 294 F.3d 991, 994 (8th Cir. 2002) ("Rule 8(a)(1) is satisfied if the complaint say[s] enough about jurisdiction to create

14. A district court cannot entertain a suit for a declaratory judgment unless there is a "definite and concrete" controversy, *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240, 57 S. Ct. 461, 464, 81 L. Ed. 617 (1937), and, stated above, there is no controversy over the Tribal Court's jurisdiction in this case. Further, under *Montana v. United States*, 450 U.S. 544, 564–65, 101 S. Ct. 1245, 1258, 67 L. Ed. 2d 493 (1981), no controversy could exist; *Montana* plainly states that a nonmember, such as Kraus-Anderson, can consent to tribal court jurisdiction by contract.

some reasonable likelihood that the court is not about to hear a case that it is not supposed to have the power to hear.") (alteration in original) (internal quotation omitted). Here, the complaint is devoid of a single citation to a Constitutional provision, a federal statute, or a recognized theory of common law as the basis for the allegation that the Tribe's cause of action arises under federal law. The barren complaint provided by the Tribe gives us no indication of how the Tribe expected the district court to recognize, register, and enforce the Tribal judgment. *See Pan Am. Petroleum Corp. v. Superior Court*, 366 U.S. 656, 663, 81 S. Ct. 1303, 1307, 6 L. Ed. 2d 584 (1961) (finding it "immaterial . . . that the plaintiff could have elected to proceed on a federal ground. . . . If the plaintiff decides not to invoke a federal right, his claim belongs in a state court.") (internal citation omitted). Therefore, we find no other ascertainable basis for jurisdiction under § 1331.

B.

Having concluded that § 1331 does not provide a basis for federal jurisdiction in this case, we now turn to the other bases for federal jurisdiction asserted in the complaint, §§ 1332 and 1738. We can quickly reject both possibilities.

First, as the district court found regarding the possibility of diversity jurisdiction, "[t]he majority view—followed by every court of appeals that has addressed the issue—is that unincorporated Indian tribes cannot sue or be sued in diversity under 28 U.S.C.

§ 1332(a)(1) because they are not citizens of any state" (citing cases). Turning to § 1738, the Tribe asserted in its complaint that this statute—the full faith and credit statute—provided an independent basis for subject matter jurisdiction.[15] We are accordingly faced with the question of whether, under the circumstances presented here, a cause of action seeking the enforcement of a tribal court judgment creates an independent basis of subject matter jurisdiction. The clear answer is no.

Under circuit precedent, it is long established that § 1738 does not, standing alone, confer jurisdiction on a federal district court to domesticate a judgment rendered by a court of another jurisdiction. *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 153 n.1 (5th Cir. 1974). Similarly, an appeal to comity does not, standing alone, create federal question jurisdiction under 28 U.S.C. § 1331. 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4473 (2d ed. 2002 & Supp. 2009). As the Sixth Circuit has noted, an argument that comity brings about federal question jurisdiction "puts the proverbial cart before the horse. . . . [W]hen an action already rests on federal question jurisdiction, the theory of comity can serve as a discretionary basis for a court

15. 28 U.S.C. § 1738 provides, in relevant part, that the authenticated records and judicial proceedings of any court of any such State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

to determine whether a foreign country court's judgment should be given preclusive effect." *Taveras v. Taveraz*, 477 F.3d 767, 783 (6th Cir. 2007). Furthermore, the Tribe no longer asserts § 1738 as a basis for federal jurisdiction; in its supplemental briefing, the tribe states, "As we pointed out at oral argument, . . . the Tribe did not rely upon § 1738 . . . ." Therefore, we conclude that none of the provisions cited in the Tribe's complaint—§§ 1331, 1332, and 1738—confer subject matter jurisdiction to the district court and thus the Tribe cannot enforce its monetary judgment in federal court.[16]

III.

A federal court must have subject matter jurisdiction to grant a party the relief it seeks. Contrary to the district court's holding, the parties here have not presented any basis for subject matter jurisdiction. Accordingly, the judgment of the district court is REVERSED, and the case is REMANDED with direction to the district court to dismiss for lack of subject matter jurisdiction.

SO ORDERED.

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16. Although we hold that the Tribe cannot sue in federal court to enforce the Tribal Court judgment it obtained against Kraus-Anderson, the Tribe is not without a remedy—there are other possible ways for the Tribe to enforce the judgment. The Tribe can use tribal law procedures to obtain execution of the judgment, seizing Kraus-Anderson's assets, if any, in the reservation. The Tribe can also seek enforcement of the judgment in state court and will prevail if the state court elects to grant comity to the Tribal Court's judgment.

APPENDIX B — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED MAY 23, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 04-22774-CIV-UNGARO-BENAGES

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Plaintiff,

vs.

KRAUS-ANDERSON CONSTRUCTION CO.,

Defendant.

FINAL JUDGMENT

THIS CAUSE is before the Court *sua sponte*. The Court, having granted Defendant's Renewed Motion for Final Summary Judgment (DE 191), it is ORDERED AND ADJUDGED that Final Judgment is entered in favor of Defendant and against Plaintiff in accordance with Fed. R. Civ. P. 58.

DONE AND ORDERED in Chambers at Miami, Florida, this 23d day of May 2007.

/s/ URSULA UNGARO
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
Counsel of Record

APPENDIX C — ORDER GRANTING MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED MAY 23, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 04-22774-CIV-UNGARO-BENAGES

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Plaintiff,

vs.

KRAUS-ANDERSON CONSTRUCTION CO.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendant's Renewed Motion for Final Summary Judgment. DE 191. The Court has considered the Motion and is otherwise fully advised in the premises.

a. Procedural Posture

Plaintiff is a federally recognized Indian tribe with a reservation in Miami-Dade County, Florida; Defendant is a construction company based in Minnesota. *See* DE

1 (Compl.) at paras. 5, 8; DE 58 (Second. Amend. Answer) at paras. 5, 8. The parties' underlying dispute arose out of the nonpayment of money that Plaintiff allegedly owed Defendant pursuant to three construction contracts. *See* DE 1 (Compl.) at paras. 9, 10, Ex. "A" (Tribal Court Decision) at 2-3; DE 58 (Second. Amend. Answer) at paras. 9, 10. Defendant sued Plaintiff for breach of contract in the Miccosukee Tribal Court ("Tribal Court"),[1] and Plaintiff asserted a set-off based on Defendant's alleged improper charges, overcharges, and damages due to construction defects. *See* DE 1 (Compl.) at paras. 11, 12, Ex. "A" (Tribal Court Decision) at 3, 119; DE 58 (Second. Amend. Answer) at paras. 11, 12. Following a bench trial, the Tribal Court issued a $1,654,998.88 judgment in favor of Plaintiff ("Judgment"), and Defendant sought appellate review. *See* DE 1 (Compl.) at paras. 13, 14, Ex. "A" (Tribal Court Decision) at 166; DE 58 (Second. Amend. Answer) at paras. 13, 14. The Miccosukee Business Council ("Business Council") disallowed Defendant's appeal on July 15, 2004. *See* DE 1 (Compl.), Ex. "D" (Letter Disallowing Appeal).

Plaintiff initiated this action on November 2, 2004, requesting that the Court "recognize, register and enforce" the Judgment against Defendant. *See* DE 1

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1. The parties' contracts included a "Waiver of Sovereign Immunity" provision whereby Plaintiff waived sovereign immunity with respect to certain claims brought in the Tribal Court. *See* DE 1 (Compl.), Ex. "A" (Tribal Court Decision) at 105.

(Compl.) at para. 1. On January 18, 2006, this Court issued an Order concluding, *inter alia*, that recognition of the Judgment was subject to principles of comity. *See* DE 57 (January 18, 2006 Order) at 19. Thereafter, the Court denied Defendant's Motion for Final Summary Judgment, concluding, *inter alia*, that Defendant was not entitled to summary judgment based on its arguments that the Business Council exercised undue influence over the Miccosukee judicial system and that Defendant was denied access to an appeal. *See* DE 122 (August 8, 2006 Order) at 4-6 (noting that: (1) "[t]he fact that the Miccosukee Code provides a form of appellate review different from that of the federal courts is insufficient on its own to demonstrate on summary judgment that Defendant was denied due process" (citing *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997)); and, (2) "the fact that the [Business Council,] a political branch of the Miccosukee Tribe, exercises judicial functions and ultimately reviewed Defendant's appeal is insufficient, without more, to demonstrate Defendant was denied due process" (citing *Howlett v. Salish and Kootenai Tribes of Flathead Reservation*, 529 F.2d 233, 240 (9th Cir. 1976)). Defendant's Renewed Motion for Final Summary Judgment was filed on December 13, 2006. *See* DE 191 (Motion) at 21. In the Renewed Motion, Defendant argues that it was deprived of due process in the Business Council's consideration and disallowance of the appeal because of the Business Council's evident lack of impartiality and

that, therefore, the Judgment should not be recognized as a matter of comity.

See generally DE 191 (Motion).[2]

b. Subject Matter Jurisdiction

Although the parties do not dispute that the Court has subject matter jurisdiction over this action, the Court clarifies the basis under which it has exercised jurisdiction herein. *See, e.g., Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005) (noting that "'a federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking'") (quoting *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999).

Plaintiff avers that the Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 (federal question), 1332 (diversity),[3] and "federal

2. Defendant briefly adds: (1) that the Tribal Court denied due process by refusing to allow any discussion or argument about the parties' post-trial document filings; and, (2) that the Business Council, as an appellate body, denied Defendant due process because it did not seek to have the appellate issues stated, clarified or addressed in formal argument. *See, e.g.*, DE 191 (Motion) at 19-20. The Court does not address these additional arguments, as it finds Defendant's initial argument dispositive.

3. The majority view–followed by every court of appeals that has addressed the issue–is that unincorporated Indian tribes cannot sue or be sued in diversity under 28 U.S.C. § 1332(a)(1) because they are not citizens of any state. *See* (Cont'd)

common law of comity jurisdiction" under 28 U.S.C. § 1738 (the Full Faith and Credit Act).[4] DE 1 (Compl.) at para. 2. In its Answer, Defendant "admits that this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 in that the matter at issue implicates [Defendant's] due process rights under the United States Constitution and the Indian Civil Rights Act." DE 58 (Second. Amend. Answer) at para. 2. However, due process arguments form the basis of Defendant's defenses. *Id.* at 5-7.

Under 28 U.S.C. § 1331, "federal courts have federal-question jurisdiction over suits 'in which a *well-*

(Cont'd)

American Vantage Companies, Inc. v. Table Mountain Rancheria, 292 F.3d 1091, 1094-98 (9th Cir. 2002) (joining the majority view). It is apparent that Plaintiff is an unincorporated Indian tribe and thus, subject matter jurisdiction cannot be based on 28 U.S.C. § 1332(a)(1). *See, e.g., American Vantage Cos.*, 292 F.3d at 1095 n. 1 (noting that an Indian tribe may incorporate pursuant to 25 U.S.C. § 477, or it can become a corporation pursuant to its own tribal laws); Miccosukee Reserved Area Act, 16 U.S.C.A. § 410 note, § 4(10) (indicating that the Miccosukee Tribe of Indians of Florida is organized under 25 U.S.C. § 476 (*i.e.*, not 25 U.S.C. § 477); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993) (distinguishing between an Indian tribe's constitutional entity and its corporate entity for purposes of diversity determination under 28 U.S.C. § 1332(a)) (citing *Ramey Construction Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982)).

4. "[N]either the constitutional full faith and credit clause nor the statutory implementing provisions provides a predicate for federal jurisdiction." *Rogers v. Platt*, 814 F.2d 683, 690 (D.C. Cir. 1987) (citing *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 72 (1904)).

pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Newton v. Capital Assur. Co., Inc.*, 245 F.3d 1306, 1308-09 (11th Cir. 2001) (emphasis added) (quoting *Franchise Tax Bd. v. Const. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983)). As noted in *Jones v. LMR Intern., Inc.*, 457 F.3d 1174 (11th Cir. 2006), the well-pleaded complaint rule requires that a court look "to the face of the complaint rather than to defenses, for the existence of a federal question." *Id.* at 1178 (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392-93 (1987)). In this case, the Complaint does not disclose a proper statutory basis for federal subject matter jurisdiction.

Nonetheless, the Court finds persuasive *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), where, in rejecting the argument that the recognition of tribal judgments required the application of state law, the Ninth Circuit Court of Appeals stated:

> We apply federal common law when a federal rule of decision is 'necessary to protect uniquely federal interests.' Indian law is uniquely federal in nature, having been drawn from the Constitution, treaties, legislation, and an 'intricate web of judicially made Indian law.' State law, especially the compacts between a state and a tribe, may be of substantial significance in a particular case. However, the quintessentially federal

> character of Native American law, coupled with the imperative of consistency in federal recognition of tribal court judgments, by necessity require that the ultimate decision governing the recognition and enforcement of a tribal judgment by the United States be founded on federal law.

Id. at 813 (internal citations omitted).

Accordingly, the Court finds that subject matter jurisdiction over this action, which seeks the enforcement of a tribal court judgment against a non-Indian party, is based on federal common law. *See National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (noting that § 1331's statutory grant of jurisdiction will support claims founded upon federal common law); *cf. MacArthur v. San Juan County*, 391 F. Supp. 2d 895, 987-88 (D. Utah 2005) (stating that "[i]mplicit in the recognition of tribal court judgments by federal or state courts as a matter of comity or full faith and credit is the question whether the tribal court had subject-matter and personal jurisdiction to render an enforceable judgment-which necessarily implicates the federal question identified in *National Farmers* [*i.e.*, whether a tribal court has exceeded the lawful limits of its jurisdiction]. Though a plaintiff seeking enforcement of a tribal court judgment does not plead a cause of action created by federal law, the action nonetheless is one 'arising under' federal law because it 'turn[s] on substantial questions of federal law.'") (citing *Grable & Sons Metal Products, Inc. v.*

Darue Engineering & Mfg., 545 U.S. 308, 312-14 (2005), where the Supreme Court noted that federal question jurisdiction lies over state-law claims that "necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.").

c. Standard of Review

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A court must consider the evidence and all factual inferences drawn therefrom in the light most favorable to the non-moving party. *See Hairston v. Gainsville Sun Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993). The moving party bears the initial burden to establish the basis for the motion and to point to the record and show an absence of a genuine issue of material fact. *See Hickson Corp. v. Northern Crossarm Co., Inc.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004) (also stating that an issue of fact is "'material' if, under the applicable substantive law, it might affect the outcome of the case", and is "'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party."). "Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to 'come forward with specific facts

showing that there is a genuine issue for trial.'" *International Stamp Art, Inc. v. U.S. Postal Service*, 456 F.3d 1270, 1274 (11th Cir. 2006) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)).

With respect to tribal judgments, it has been held under principles of comity that "as a general principle, federal courts should recognize and enforce tribal judgments." *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997) ("synthesizing the traditional elements of comity with the special requirements of Indian law"). "However, federal courts must neither recognize nor enforce tribal judgments if . . . the defendant was not afforded due process of law." *Id.* In this case, Defendant has asserted in pertinent part that "[t]he judgment of the Tribal Court is not entitled to recognition, registration or enforcement because [Defendant] was not afforded due process, as required by well-established principles of comity." DE 58 (Second. Amend. Answer and Defenses) at para. 18. Defendant bears the burden of establishing this defense (*see generally Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136 (9th Cir. 2001)), and thus, "it must establish that there is no genuine issue of material fact as to any element of that defense." *International Stamp Art, Inc.*, 456 F.3d at 1274.

d. Facts Pertinent to Defendant's Motion[5]

Pursuant to Plaintiff's Constitution and Bylaws, the Miccosukee Business Council is granted authority, *inter alia*, "[t]o engage in any business that will further the economic well-being of the members of the Tribe . . ." and "[t]o make and perform contracts and agreements of every description . . . ." *See* DE 192 (Def.'s Statement) at para. 1 (citing DE 193 (Exs. in Support of Def.'s Mot.), Ex. "A" (Constitution and Bylaws of the Miccosukee Tribe of Indians) at Art. V, §§ 7-8). During the negotiation and administration of the parties' construction contracts, as well as during consideration

5. As part of its Response to Defendant's Motion, Plaintiff indicates that it disputes many of the facts Defendant submitted in its statement of material facts, and that this precludes summary judgment. *See* DE 196 (Pl.'s Response) at paras. 3-5. However, Defendant's statement of material facts (DE 192) is supported by specific references to the record in accordance with S.D. Fla. L.R. 7.5(C). In contrast, the pertinent portions of Plaintiff's statement in opposition are unsupported (*see, e.g.*, DE 197 (Pl.'s Statement) at paras. 1, 2, 5, 7, 8, 9, 11), and in this regard, cannot support an argument that genuine issues of material fact preclude summary judgment herein. *See International Stamp Art, Inc.*, 456 F.3d at 1274 (stating that "[o]nce the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to 'come forward with *specific facts showing that there is a genuine issue for trial.*'") (emphasis added); *also* S.D. Fla. L.R. 7.5(D) (providing that "[a]ll material facts set forth in the movant's statement filed and supported as required by Local Rule 7.5.C will be deemed admitted unless controverted by the opposing party's statement, provided that the Court finds that the movant's statement is supported by evidence in the record.).

of Defendant's notice of appeal of the Tribal Court Judgment, the Business Council was comprised of the following five members: Billy Cypress (Chairman), Jasper Nelson (Ass't. Chairman), Max Billie (Treasurer), Andrew Bert, Sr. (Secretary), and Jerry Cypress (Lawmaker). *Id.* at para. 2 (citing DE 193 (Exs. in Support of Def.'s Mot.), Ex. "B" (Various Letters); Ex. "C" (Letter Disallowing Appeal).

Chairman Cypress was Plaintiff's primary negotiator respecting the parties' contracts. *Id.* at para. 12 (citing DE 193 (Exs. in Support of Def.'s Mot.), Ex. "K" (Tribal Court Decision) at 88-95. However, other members of the Business Council were also present during Defendant's presentations to Plaintiff prior to the execution of the parties' contracts. *Id.* at para. 6 (citing DE 193 (Exs. in Support of Def.'s Mot.), Ex. "E" (Cypress's March 11, 2003 Depo.) at 26-30. The Business Council was also involved in the process of reviewing and approving construction documents, authorized Chairman Cypress's execution of the contracts on behalf of the Tribe, received periodic updates respecting the progress of the construction projects, and had oversight of the same. *See* DE 193 (Exs. in Support of Def.'s Mot.), Ex. "G" (Business Council Updates); Ex. "I" (Julio Martinez's October 9, 2002 Depo.) at 29:1-23; Ex. "J" (Cypress's September 7, 2006 Depo.) at 39:1-8, 42:2-12; Ex. "S" (Julio Martinez's October 19, 2006 Depo.) at 15:5-19. Chairman Cypress personally approved change orders respecting the construction projects and corresponded with Defendant periodically concerning the projects' costs and progress. *See* DE 193 (Exs. in

Support of Def.'s Mot.), Ex. "K" (Tribal Court Decision) at 68-69, 89-93; Ex. "B" (Oct. 1999 Letters). The Business Council was copied with correspondence executed by Chairman Cypress outlining Plaintiff's position that Defendant had overcharged Plaintiff and that Plaintiff had overpaid Defendant. *See* DE 193 (Exs. in Support of Def.'s Mot.), Ex. "B" (Oct. 1999 Letters).[6] Ultimately, Chairman Cypress, along with the other members of the Business Council, concluded that Plaintiff would make no further payments to Defendant. *See* DE 193 (Exs. in Support of Def.'s Mot.), Ex. "J" (Cypress's September 7, 2006 Depo.) at 44:4-9, 45:13-20.

Chairman Cypress was one of Plaintiff's witnesses in the trial conducted before the Tribal Court. *See* DE 193 (Exs. in Support of Def.'s Mot.), Ex. "K" (Tribal Court Decision) at 88. He testified about his initial discussions with Defendant, the selection of Defendant as general contractor, the progress of the work, his oversight of the change order process, unauthorized charges, and construction delays. *Id.* at 88-95. No other members of the Business Council testified at trial. *Id.* at 3-101.

After the Tribal Court Judgment issued in favor of Plaintiff, Defendant appealed. *See* DE 193 (Exs. in

6. These letters refer to an auditing of the construction costs for all the projects under the parties' contracts (*i.e.*, the Halfway House, Tribal Clinic, Judicial Center, K-12 School, and Resort), and discuss several areas of Defendant's charges that Plaintiff disputed, pursuant to which Defendant allegedly overcharged Plaintiff. *Id.*

Support of Def.'s Mot.), Ex. "Q".[7] The appeal was considered and disallowed by the Business Council (including Chairman Cypress) acting as an intermediate appellate court. *See* DE 192 (Def.'s Statement) at para. 3; DE 1 (Compl.) at para. 14; DE 72 (Pl.'s Resp. to Def.'s Mot. (DE 67)), Ex. 2 (Dione Carroll Aff.).

Title II, Part II, § 13 of the Miccosukee Criminal and Civil Code ("Miccosukee Code") provides that:

> *Section 13. Appeals.* Appeals may be taken from the final order of the Miccosukee Court to the Miccosukee Court of Appeals by filing with the Clerk a notice of appeal within fifteen (15) days of the entry of the order from which the appeal is taken with the approval of the Miccosukee Business Council. The Clerk shall

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7. Defendant's "Notice of Appeal" indicated that the appeal was based on "certain issues contained in the decision", including but not limited to the following: (1) "[t]he Trial Court exceeded its powers by deciding on matters that was [sic] not before the Court for decision and not presented to the Court at trial;" (2) "[t]he decision contains several mistakes on the calculation of figures that significantly alters the proper award to the parties;" (3) "[b]y excluding certain evidence material to the controversy, the Court severely prejudiced [Defendant's] ability to present its case in a just and equitable manner, and;" (4) "[t]he number of errors of law and fact contained in the decision demonstrates an overall prejudice against the interests of [Defendant] such that a new trial must be granted in order to protect the fairness and integrity of the judicial process for the Miccosukee Tribe." DE 193 (Exs. in Support of Def.'s Mot.), Ex. "Q" at 1.

> transmit any notice of appeal to the Chairman of the Business Council promptly upon receipt, and the Business Council shall disallow the appeal or refer it to the Court of Appeals within ten (10) days. The Court of Appeals may affirm or reverse the order of the Miccosukee Court, order a new trial, or may increase or decrease any sentence or fine. On appeal, each case shall be tried anew, except for questions of fact submitted to a jury at the trial in the Miccosukee Court. Proceedings in the Miccosukee Court of Appeals shall be in accordance with the procedures specified in section 4.1, except that there shall be no jury and the Chairman of the General Council shall preside. Decisions of the Miccosukee Court of Appeals shall be by majority vote of the members present. The Miccosukee Court of Appeals may issue rules governing the conduct of its proceedings and appropriate forms not inconsistent with the provisions of the Code.

DE 193 (Exs. in Support of Def.'s Mot.), Ex. "D" (Miccosukee Code), Title II, Part II, § 13. Although this "Appeals" section appears in the "Criminal Procedure" portion of the Miccosukee Code (*i.e.*, Title II), the parties agree that the section is applicable to civil proceedings in accordance with tribal custom and practice. *See* DE 228 (Pl.'s Further Briefing), Ex. 1 (Dione Carroll Aff.) at paras. 4-5; DE 193 (Exs. in Support of Def.'s Mot.), Ex. "P" (Rules of Appellate Procedure

of the Miccosukee Court of Appeals), A(3) (providing that "[p]ursuant to the Miccosukee Code, *Miccosukee customary law, tradition and tribal precedent, appeal may be taken from a final order of the Miccosukee Court.*") (emphasis added).

> In disallowing the appeal, the Business Council stated:
>
> In accordance with Tribal procedure, the Miccosukee Business Council conducted a review of the record in this case and convened a special session to consider your appeal. After careful consideration, the Miccosukee Business Council has determined that the Miccosukee Tribal Court Order, which is the subject of your Notice of Appeal, does not constitute a departure from the essential requirements of Miccosukee Law and/or procedure and other applicable laws and raises no issues meriting review by the Miccosukee Court of Appeals.
>
> Accordingly, the Miccosukee Business Council has decided to disallow the appeal. The decision of the Miccosukee Business Council is final.

DE 1 (Compl.), Ex. "D" (July 15, 2004 Letter Disallowing Appeal).

e. Defendant's Argument and Plaintiff's Response

In the Motion now before the Court, Defendant focuses on the Business Council's action in disallowing Defendant's appeal. Defendant argues that partiality and prejudice infected the Business Council's review of Defendant's appeal, as the Council had a long-standing interest in Plaintiff's defense against Defendant's claims. *See* DE 191 (Motion) at 4-5. Defendant points to Chairman Cypress's deposition testimony concerning the role of the Business Council before and after the execution of the parties' contracts, and specifically, the Council's involvement in Plaintiff's decision not to pay Defendant. *Id.* at 6-9 (quoting DE 193 (Exs. in Support of Def.'s Mot.), Ex. "J" (Cypress's September 7, 2006 Depo.) at 38-45).[8]

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8. Defendant refers, *inter alia*, to the following exchange:

Q. But there came a point when the tribe said, We're not going to pay you any more money?

A. That is correct.

Q. And the Business Council concluded that along with you?

A. That is correct.

***

Q. But whatever the reason, the tribe refused to pay the money that [Defendant] wanted, right?

A. Right.

Q. And that decision not to pay was confirmed by all members of the Business Council, right?

(Cont'd)

Defendant adds that Chairman Cypress was a material witness for the Tribe in that proceeding. *Id.* at 5. Thus, Defendant contends that:

> In addressing [Defendant's] Notice of Appeal, the Business Council members in effect were passing judgment on whether the trial judges' rulings coincided with the Business Council's own pretrial decisions and actions with respect to [Defendant's] contracts and payments to [Defendant]. Those facts would lead a reasonable person to doubt the impartiality of the Business Council, sitting as judges, in its handling of [Defendant's] case. Each member of the Business Council was conflicted, and Chairman Cypress was especially so because of his trial testimony on behalf of the Tribe and against [Defendant].

Id. at 9-10.

Defendant cites *Tumey v. Ohio*, 273 U.S. 510 (1927) in support of its argument. *Id.* at 10. *Tumey* involved a criminal defendant's due process challenge to a judgment of conviction issued by a village mayor that also served in a judicial capacity and received additional compensation for those judicial services only upon a defendant's conviction. *See Tumey*, 273 U.S. at 514-23.

(Cont'd)

A. I believe that they would have to, because they're charged with overseeing the, you know, the business affairs.

Id. at 8-9 (quoting DE 193 (Exs. in Support of Def.'s Mot.), Ex. "J" (Cypress's September 7, 2006 Depo.) at 44:4-9, 45:13-20).

Appendix C

The Supreme Court stated in pertinent part:

> There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Id. at 532. According to Defendant, the Business Council was similarly conflicted in this case, and its members should have disqualified themselves pursuant to the Miccosukee Code,[9] or recused themselves as due process

9. The Miccosukee Code provides in pertinent part:

Section 12. Disqualification of Judges. Any Judge shall be disqualified to act in any proceeding:

(1) in which he or she has an interest;

(2) in which he or she is or has been a material witness; or

(3) in which he or she is related to any party or their attorney by marriage or blood in the first or second degree.

A judge may be disqualified on his own motion or by the filing of an affidavit of prejudice by any party in the proceeding.

Id. at para. 4 (citing DE 193 (Exs. in Support of Def.'s Mot.), Ex. "D" (Miccosukee Criminal and Civil Code), Title I, § 12.

requires. *See* DE 191 (Motion) at 10. Defendant also suggests that the Business Council could have allowed the appeal to proceed to the Miccosukee Court of Appeals, "where the Business Council does not preside." *Id.* at 11. In this regard, Defendant notes that the Miccosukee Court of Appeals consists of the Miccosukee General Council, and suggests that Chairman Cypress could have disqualified himself from serving as Chairman of the General Council and arranged for someone without a direct interest to serve as the presiding judge. *Id.* at n. 4; *also* DE 72 (Pl.'s Resp. to Def.'s Mot. (DE 67)), Ex. 2 (Dione Carroll Aff.) (noting that the Miccosukee Court of Appeals is comprised of the Miccosukee General Council, consisting of all the adult members of the Tribe age 18 or older, which at the time of Defendant's notice of appeal approximated 209 members); DE 193 (Exs. in Support of Def.'s Mot.), Ex. "A" (Constitution and Bylaws of the Miccosukee Tribe of Indians) at Art. III, § 1) (establishing with respect to the Miccosukee General Council, that "[t]wenty-five members shall constitute a quorum, provided at least three clans are represented, and no business shall be conducted unless a quorum is present at all times.").

Finally, Defendant outlines three issues it contends illustrate that there were legitimate grounds for an appeal: (1) an alleged $30,000.67 mistake in the Judgment resulting from an apparent mathematical miscalculation; (2) a discrepancy (exceeding $600,000) between the relief Plaintiff requested at trial and the Judgment; and, (3) the Tribal Court's consideration of documents it requested from the parties post-trial (*i.e.*,

documents that were not admitted nor addressed during the trial). *Id.* at 12-14.

In response to Defendant's contention that the Business Council had a long-standing interest in Plaintiff's defense in the Tribal Court, Plaintiff submits that Defendant's argument is based on the "slimmest of facts". *See* DE 196 (Pl.'s Response) at paras. 14-15. According to Plaintiff, "[Defendant] has not and cannot establish a scintilla of evidence linking the accounting and contract issues upon which this case turned to any general updates respecting the construction progress that the Business Council may have received as the Tribe's legislative body."[10] *Id.* at para. 16. Further, Plaintiff submits that "only 'outrageous departures from our notions of civilized jurisprudence' will justify a refusal to provide comity to a Tribal body's decision"–that Defendant has not shown such a departure–and that "it is perfectly acceptable for the same executive body to exercise concurrent legal functions." *Id.* at paras. 17-18 (citing *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1142 (9th Cir. 2001); *Duro v. Reina*, 495 U.S. 676, 693 (1990); *Howlett v. Salish and Kootenai Tribes of Flathead Reservation*, 529 F.2d 233, 240 (9th Cir. 1976)).

Plaintiff also disputes Defendant's suggestion that the members of the Business Council had a duty to disqualify themselves pursuant to the Miccosukee Code,

10. According to Defendant, the Tribe's General Council, not the Business Council, is Plaintiff's legislative body. *See* DE 200 (Reply) at 2 n. 2.

noting that under the Code, disqualification is an option that can be initiated either by a "judge" or a litigant,[11] and that, in any event, Council members are not judges within the Code's definition. *Id.* at paras. 18-20. Plaintiff further suggests that Defendant's contentions would not require the recusal of a judge in a federal court, as the "'unsupported, irrational or highly tenuous speculation'" that Defendant relies on would not satisfy the objective test that federal courts apply in these situations–*i.e.*, whether a reasonable person would have a reasonable basis for questioning the judge's impartiality. *Id.* at paras. 21-23 (quoting *U.S. v. Cherry*, 330 F.3d 658, 665 (4th Cir. 2003) (also stating that "a presiding judge need not recuse himself simply because he possesses some tangential relationship to the proceedings"). As to Defendant's reference to *Tumey v. Ohio*, 273 U.S. 510 (1927), Plaintiff submits that the expectations and standards discussed in the opinion are inapplicable to Indian tribes, "who have been recognized and authorized to allow judicial and/or other functions to be performed by the same body." *Id.* at para. 24 (citing *Howlett*, 529 F.2d at 240).

Finally, Plaintiff disputes the merits of Defendant's appellate issues and states, *inter alia*, that "comity does not require a party to win when he should . . ., nor does it entitle a litigant to absolute mathematical accuracy. On the contrary, 'due process' entitles a party only to (a) an impartial tribunal, (b) who conducts regular

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11. Plaintiff has not argued that Defendant waived disqualification by failing to file an affidavit of prejudice.

proceedings after proper service." *Id.* at para. 26. With respect to the Tribal Court's consideration of documents it requested after trial, Plaintiff notes that tribal court procedures need not be the same procedures that federal courts follow and that federal courts should avoid undue or intrusive interference in reviewing those procedures. *Id.* at para. 29 (citing *Smith v. Confederated Tribes of Warm Springs Reservation of Oregon*, 783 F.2d 1409, 1412 (9th Cir. 1986)).

f. Analysis

As an initial matter, the Court addresses Plaintiff's suggestion that Defendant has the burden to show "outrageous departures from our notions of civilized jurisprudence . . .". *See, e.g.*, DE 196 (Pl.'s Response) at paras. 17, 18, 21, 33. Plaintiff cites *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136 (9th Cir. 2001)[12] for this proposition. *Id.* at para. 17. However, the *Bird* Court did not hold that this was the standard that a party opposing the recognition of a tribal judgment on due process grounds must satisfy. Rather, the language Plaintiff cites appears in a quotation from an earlier case, *British Midland Airways Ltd. v. Int'l Travel, Inc.*, 497

12. In *Bird* the Court considered "whether a district court may give comity to a tribal court judgment, for purposes of recognition and enforcement, where the closing argument of the successful plaintiff in tribal court included numerous statements encouraging ethnic and racial bias of an all tribal member jury against a corporate defendant that was owned and controlled by persons who were not tribal members." *Bird*, 255 F.3d at 1138.

F.2d 869, 871 (9th Cir. 1974). The Court explained that: "[o]ur holding in *British Midland Airways* makes clear both that we must assess due process given in a foreign nation and that a foreign court's procedures need not be identical to our procedures to permit a grant of comity." *Id.* However, the *Bird* Court did not conclude that only "outrageous departures" from notions of civilized jurisprudence–to the extent Plaintiff suggests that more than a due process violation must be shown–would bar the recognition of a tribal judgment. Indeed, the balance of the opinion repeatedly states otherwise; for instance: "[w]e must decide whether the tribal court procedures in this case violated due process so as to preclude comity" (*id.* at 1142); "[f]or purposes of our comity analysis in this case we see no reason to depart from traditional due process values requiring fundamental fairness" (*id.* at 1144); "[w]e now address whether Glacier Construction's closing argument violated due process" (*id.*); "[w]e conclude that the district court erred in giving comity to recognize and enforce the tribal court judgment here because, in view of the closing argument, the tribal court proceedings offended due process" (*id.* at 1138). Ultimately, given that the due process violation in *Bird* concerned the contents of a closing argument that was not objected to nor challenged via a timely motion for new trial, the Court conducted a "plain or fundamental error" review, and framed the issue as follows: "whether [the] closing argument to the jury in tribal court offended fundamental fairness and deprived the Co-op of our Constitution's guarantee of due process." *Id.* at 1148.

In this case, consistent with the foregoing discussion, the Court will consider whether Defendant was afforded due process of law, or stated otherwise, whether Defendant was denied due process of law. As previously noted, this is the standard outlined in *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), where the Ninth Circuit Court of Appeals stated that "federal courts must neither recognize nor enforce tribal judgments if . . . *the defendant was not afforded due process of law*." *Wilson*, 127 F.3d at 810 (emphasis added). This is the very principle recognized in *Bird*, as well as other cases dealing with the recognition of tribal judgments under principles of comity. *See, e.g., Bird*, 255 F.3d at 1141; *Burrell v. Armijo*, 456 F.3d 1159, 1171-72 (10th Cir. 2006); *John v. Baker*, 982 P.2d 738, 762-63 (Alaska 1999).

> As to what due process entails for the purposes of comity, the *Wilson* Court explained:
>
> Due process, as that term is employed in comity, encompasses most of the [*Hilton v. Guyot*, 159 U.S. 113 (1895)] factors, namely that there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws. Further, as the [Restatement (Third) of Foreign Relations

> Law of the United States] noted, evidence 'that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable to obtain counsel, to secure documents or attendance of witnesses, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition.'

Id. at 811.

Moreover, because Defendant's argument addresses the apparent partiality of the Business Council acting in an adjudicative role, the Court is guided by constitutional due process principles in the context of judicial functions. In this regard, the Supreme Court has stated that:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the

> average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'

In re Murchison, 349 U.S. 133, 136 (1955) (internal citations omitted). Similarly, in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) the Court noted that:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a

> popular government, that justice has been done,' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Id. at 242 (internal citations omitted).

What these statements reflect is that constitutional due process concerns come into play, not only where a judge is actually influenced by the circumstances at issue, but also where those circumstances "would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822, 825 (1986) (internal quotation marks and citation omitted) (also noting, at 820-22, that while the Constitution does not reach every issue of judicial qualification–*e.g.*, kinship, personal bias, state policy, remoteness of interest–"'it certainly violates the Fourteenth Amendment ... to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.'") (quoting *Tumey*, 273 U.S. at 523). In *Aetna*, the Supreme Court noted that "under the Due Process Clause no judge 'can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome . . . . "[W]hat *degree or kind* of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.'" *Id.* at 822 (emphasis

added) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).[13]

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13. *Aetna* examined "whether the Due Process Clause of the Fourteenth Amendment was violated when a justice of the Alabama Supreme Court declined to recuse himself from participation in that court's consideration of [the] case." *Aetna*, 475 U.S. at 815. The question arose because while the underlying action was pending before the Alabama Supreme Court, oneof its justices (Justice Embry) instituted two actions against insurance companies, including a class action that appeared to include all justices of the Alabama Supreme Court as class members. *Id.* at 817. Judge Embry ultimately cast the decisive vote and authored a precedent-setting opinion in the underlying action that "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." *Id.* at 822-24. The Court noted, *inter alia*, that soon after the opinion was announced, Judge Embry received $30,000.00 to settle his own suit. *Id.* at 824. The Court held that Justice Embry acted as a judge in his own case and that his interest in the underlying dispute was "direct, personal, substantial, [and] pecuniary." *Id.* at 824 (internal quotation marks and citations omitted). Further the Court concluded "that Justice Embry's participation in [the] case violated appellant's due process rights as explicated in *Tumey*, *Murchison*, and *Ward*." *Id.* at 825. On the other hand, the Court held that there was no basis for concluding that other justices of the Alabama Supreme Court were disqualified under the Due Process Clause. *Id.* at 827. Specifically, the Court noted that:

> [N]othing in the record even suggests that these justices had any knowledge of the class action before the court issued a decision on the merits. Thus, at most only the decision to deny rehearing was even plausibly affected. Any interest that they might have had when they passed on the rehearing motion was clearly highly speculative and contingent. At the time, the trial court

(Cont'd)

Appendix C

With respect to the issue of whether constitutional due process requires that a litigant be afforded the right to an appeal, the Supreme Court has recognized that "if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review." *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *also U.S. v. MacCollom*, 426 U.S. 317 (1976) (stating that "[t]he Due Process Clause of the Fifth Amendment does not establish any right to an appeal . . . ."). "When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey*, 405 at 77. It is also apparent from *Aetna* that once an appeal is afforded, constitutional due process requires that appellate judges not sit in a case in a situation "which would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true." *Aetna*, 475 at 822, 825 (internal quotation marks and citation omitted). This standard follows from

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(Cont'd)

> had not even certified a class, let alone awarded any class relief of a pecuniary nature.

Id. at 826. Thus, the Court stated that "while these justices might conceivably have had a slight pecuniary interest, we find it impossible to characterize that interest as direct, personal, substantial, [and] pecuniary." *Id.* at 825-26 (internal quotation marks, footnote and citations omitted). Nevertheless, given Justice Embry's leading role in the decision at issue (*i.e.*, he authored the opinion and his vote was determinative in the 5-to-4 decision), the Court vacated the judgment of the Alabama Supreme Court and remanded the action for further proceedings not inconsistent with the opinion. *Id.* at 828-29.

Supreme Court precedent stressing "fairness" in a tribunal as a basic requirement of due process and noting that "no man is permitted to try cases where he has an *interest* in the outcome." *See Murchison*, 349 U.S. at 136 (emphasis added) (also noting that "interest cannot be defined with precision. Circumstances and relationships must be considered."). Similarly, federal courts require the disqualification of federal judges where "a reasonable person, apprised of all the facts and circumstances, would question the judge's impartiality." *U.S. v. Killough*, 848 F.2d 1523, 1529 (11th Cir. 1988); *U.S. v. Kelly*, 888 F.2d 732, 744-45 (11th Cir. 1989) (outlining the principles governing the recusal of federal judges under 28 U.S.C. § 455, which is applicable to appellate proceedings (*see* § 455(d)(1)); DE 196 (Pl.'s Response) at paras. 21-23 (acknowledging this standard and suggesting that Defendant's contentions would not require the recusal of a judge in federal court).

In this case, the Court notes that despite its argument that the members of the Business Council are not judges for purposes of the Miccosukee Code, Plaintiff maintains that the Business Council acted as an intermediate appellate court in considering Defendant's notice of appeal.[14] *See* DE 1 (Compl.) at para.

14. Plaintiff does not argue that the Business Council sat as an intermediate appellate court despite of its involvement in the underlying dispute because the matter could not be considered otherwise. *See, e.g., U.S. v. Will*, 449 U.S. 200, 211-217 (1980) (discussing the Rule of Necessity–*i.e.*, "although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise"–and holding that 28 U.S.C. § 455 was not intended to alter said rule).

14; DE 72 (Pl.'s Resp. to Def.'s Mot. (DE 67)), Ex. 2 (Dione Carroll Aff.). According to Plaintiff, this form of appellate review is available to all Tribal Court litigants, including the Defendant in this case, pursuant to the Miccosukee Code and tribal custom and practice. *See* DE 228 (Pl.'s Further Briefing), Ex. 1 (Dione Carroll Aff.) at paras. 4-5. Also, although the appellate review performed by the Business Council in this case may have differed from that performed by a state or federal court of appeals, Plaintiff does not argue that, for purposes of the comity analysis in this case, the Court should "depart from traditional due process values requiring fundamental fairness." *See, e.g., Bird*, 255 F.3d 1143-44 (noting that "in a comity analysis concerns for respecting a sovereign's procedures and avoiding paternalism are reduced when tribal court laws and procedures governing trials and appeals track those of our federal courts", and suggesting a weighing of interests where the matter at issue concerns procedures that differ from those "commonly employed in Anglo-Saxon society").

Guided by the foregoing principles and considerations, the Court is persuaded that the Tribal Court Judgment cannot be recognized by this Court because, after its involvement in the process underlying the parties' dispute, the Business Council's adjudicative undertaking as the intermediate appellate panel that disallowed Defendant's appeal amounts to a denial of due process under principles of comity. In reaching this conclusion, the Court finds determinative that before acting as an intermediate appellate court: (i) Chairman Cypress, while sitting as both Chairman of the Tribe

and the Business Council, took personal responsibility for all change orders and the change order process, corresponded with Defendant concerning what he viewed as excessive and unauthorized project costs and delays, authored correspondence articulating the Tribe's decision to withhold payment based on alleged over billing and unauthorized charges, and proposed a settlement of the parties' disputes; (ii) the Business Council was copied with correspondence authored by Chairman Cypress and Julio Martinez, the Tribe's C.P.A., outlining Plaintiff's position respecting Defendant's alleged improper charges and Plaintiff's alleged overpayments; (iii) the Business Council, while under the leadership of Chairman Cypress, concluded that Plaintiff would not make further payments to Defendant; (iv) Chairman Cypress testified for Plaintiff in the Tribal Court concerning the parties' relationship, including what he viewed as unauthorized charges and unwarranted construction delays; and (v) Chairman Cypress, in his capacity as Chairman of the Business Council, also participated in the Business Council's consideration and disallowance of Defendant's appeal. These facts, which are undisputed, compel the conclusion that the Business Council–sitting as an intermediate appellate court examining whether Defendant's appeal should proceed to the Miccosukee Court of Appeals–was placed in a situation "which would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true." *Aetna*, 475 at 822, 825 (internal quotation marks and citation omitted). The Court is mindful that tribal court procedures need not mirror those of federal courts. *See,*

e.g., *Marchington*, 127 F.3d at 811. The Court's determination, however, is not based on a procedural deficiency of the Miccosukee judicial system, but on the Business Council's adjudicative undertaking in this specific case, after, *inter alia*, previously concluding that Plaintiff would withhold further payments to Defendant. In this regard, the Business Council's involvement and interest in the underlying dispute cannot be characterized as tangential, trivial or speculative as Plaintiff suggests, but as direct, substantial and pecuniary on Plaintiff's behalf. Indeed, Plaintiff's nonpayment of the funds it allegedly owed Defendant led to Defendant's action in the Tribal Court. The Court is convinced that impartiality is a central component of judicial proceedings the results of which Plaintiff seeks to recognize and enforce pursuant to principles of comity. *Id.* at 810-811. That component has been significantly compromised in this case. Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion (DE 191) is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 23rd day of May, 2007.

/s/URSULA UNGARO
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING RE-HEARING EN BANC, FILED AUGUST 30, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-13039-GG

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Plaintiff-Counter Defendant-Appellant,

versus

KRAUS-ANDERSON CONSTRUCTION COMPANY,

Defendant-Counter Claimant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT and CARNES, Circuit Judges, and BOWEN, *District Judge.

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*Honorable Dudley H. Bowen, Jr., United States District Judge for the Southern District of Georgia, sitting by designation.

Appendix D

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE